JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ………….had jurisdiction to hear this matter.
2. The arbitration hearings were held on 29 March, 9 July, 15 October 2018 and 30 January 2019 at the ………..offices, ……………. The applicant was represented by Mr S P ……………. (…………official), while the respondent was represented by Mr S ……………. (legal officer). Both representatives were experienced in attending to arbitrations for many years and accordingly the arbitration was conducted largely in an adversarial manner.
3. The respondent handed in its bundle of documents on 9 July 2018 and supplemented it during the course of the day a number of times. The arbitration was paused on each occasion when the respondent indicated that it needed further documents to be sent from its offices. The applicant did not, after perusing the various documents, dispute any of them as regards their authenticity or the correctness of their contents. The applicant for his part did not hand in any documents.
4. With the consent of the parties a pre-arb was conducted 29 March 2018. For this purpose a checklist containing the issues that one normally encounters in alleged misconduct arbitrations was distributed to both parties. A typed minute of the pre-arb was distributed to the parties. The parties indicated on 9 July 2018 that the minute was correct. It was then read into the record. The parties were advised to keep the minute handy to remind them constantly of the issues and to ensure that their witnesses deal with the disputed issues.
5. At the commencement of each new hearing day the parties were advised as follows: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is to test the credibility and reliability of evidence and to show that your version is more probable. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
6. The parties were also advised that in the event that they intended placing any reliance on circumstantial evidence, that such evidence will be considered to be persuasive if the inference sought to be drawn from it is consistent with all the proved facts and it is the most plausible inference. It need not be the only inference,
7. An explanation, together with an example, of how circumstantial evidence is applied in practice was given to the parties while …………….. (a witness for the respondent) was being cross-examined.

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought reinstatement and back-pay. No statutory claims were made.

BACKGROUND TO THE DISPUTE

1. The applicant is …………………., (a male, age 53), line operator. He commenced casual employment with the respondent in February 2001 as a “dyna” test driver and joined it as a full-time employee 3 years later in terms of a written indefinite term employment contract. He was dismissed in writing on 13 October 2017. He earned R17 600pm and worked a 5 day / 40 hour week. The applicant has not obtained alternative employment despite making attempts, nor has he earned anything from casual work. His highest standard of education is Std 9 (now known as Gr 11). As breadwinner he had 4 dependants (2 adults and 2 children).
2. The respondent is …………………..(PTY) LTD, an assembler of the ………brand of truck and bus chassis. It employs approximately 700 employees in the Republic at 26 branches. The applicant was based at its …………….plant. It was agreed that the respondent’s product – ……………– is a prestigious brand known for its high quality.
3. The applicant was suspended on 6 September 2017 with pay. He was given a notice to attend a disciplinary hearing on 14 September 2017 containing the following charges: “***Charge 1:*** *Offensive behaviour: In that on the 16 August 2017 you wrote a vulgar and offensive word on chassis number A84-0695. The word written was puss. The vulgarity and offensive nature of the action is deemed by the company code of conduct as serious and dismissible. The behaviour is foreign and cannot be accepted as MAN automotive business culture.* ***Charge 2:*** *Gross negligence: Failure to comply with safety critical item: On the 21 July 2017 at 11.42am you tightened bolts on HB2-1715 with an electronic torgue tool. The bolts are safety critical bolts which means not tightening them can result in the loss of life of person on board. The bolts were found not to be tightened as per electronic torque tool when checked by vehicle auditor. On the 24 July 2017 at 4.05pm you tightened bolts on HB2-1717 with an electronic tool. The bolts are safety critical bolts which means not tightening them can result in the loss of life of person on board. The bolts were found not to be tightened as per electronic torque tool when checked by vehicle auditor.* ***Charge 3:***  *Waste of production material: You used a permanent marker to write unnecessary vulgar graffiti (puss) on chassis A84-0695, and the tool is meant to be used for verification of tightening bolts.* ***Charge 4:*** *Incitement to disruptive behaviour: Your graffiti actions on chassis number A84-0695 mobilized people against the culture of open engagement and disrespect of the MAN product. Such action attributed to demoralization of staff that had consequences in dropping of units on the line against the target*.”
4. For purposes of the disciplinary hearing charges 1, 3 and 4 were taken as one. But during the hearing they were abandoned by the respondent. The applicant attended the disciplinary hearing which commenced on 20 September 2017 and after 3 sittings the applicant was found guilty of charge 2 and dismissed. He attended all the hearings, pleaded not guilty, was represented by a trained shop steward, heard evidence being given against him, gave evidence in support of his case, and did not call witnesses. The respondent does not maintain an appeal procedure hence the applicant referred and alleged unfair dismissal dispute to the DRC on 14 November 2017. The matter was conciliated on 8 February 2018 but remained unresolved. Hence the referral to arbitration.
5. The respondent indicated during the pre-arb that it intended resurrecting charges 1, 3 and 4 and would be making an application in this regard at the next sitting. When the matter resumed on 9 July 2018 the respondent indicated that it did not intend making the envisaged application. In other words the arbitration was required to deal only with charge 2. References which were originally included in the pre-arb minute to charges 1, 3 and 4 have therefore been omitted from this award.
6. The respondent submitted that the charge was based on an item in its disciplinary code (DC): “gross negligence.” It prescribes a final written warning for the first offence and summary dismissal for the second occurrence of the offence. It was agreed that the DC is contractually binding on the applicant.
7. The applicant indicated during the pre-arb that he would not be raising any procedural issues.
8. Both parties submitted written closing statements.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: …………. (inspector of tools for 6 years and employed by the respondent for 10 years); ………… (vehicle auditor for 5 years and employed by the respondent for 17 years); …………… (assembly manager responsible for production in the plant for 8 years; possessing a diploma in industrial engineering; and a diploma in labour management); and ………… (team leader of 6 years and employed by the respondent for 10 years).
2. The applicant himself gave evidence and called …………….. (operator for 2 years and elected shop steward for 10 years).
3. The following was either agreed to, common cause, undisputed or conceded during the pre-arb or the arbitration:
   1. In relation to charge 2 that an employee is required to perform his or her duties without negligence and to ensure that extra care is taken when performing tasks that are safety critical;
   2. The applicant was aware of the rules that applied in the workplace and agreed that they are important and serve useful purposes;
   3. The applicant’s principal duties consisted of the following:
      1. Tightening of bolts with the assistance of electronic torque tool to the required specification;
      2. Pre-assembly of parts before assembly is performed;
      3. Stamping of protocol book that belongs to each unique chassis indicating that work has been performed on the chassis in accordance with specifications;
   4. The applicant had been trained on the performance of his duties;
   5. The applicant had not indicated to anyone that he was having difficulties with the performance of his duties nor had he indicated that he required further training;
   6. If the applicant had indicated that he needed further training that would have been arranged;
   7. The applicant works in a team of 4 member, with each member performing different functions and tasks in different sections of the chassis;
   8. Each chassis assembled in the plant is accompanied by its own unique protocol book. This book contains a full history of the chassis from the time of manufacture;
   9. Each member of the team stamps the relevant portion of the protocol book to indicate that he or she has performed the relevant task in accordance with specifications;
   10. The applicant had performed work on two chassis (HB2-1715 & HB2-1717) during the relevant period and had stamped the protocol book to indicate that he had performed the relevant tasks to required specifications;
   11. The applicant accepted that he is responsible for the performance of his tasks and duties and that no other member of the team could be held responsible;
   12. The applicant is furnished by the respondent with all the tools that are required for the safe and proper performance of his duties. These include-
       1. Torque tool;
       2. Spanners;
       3. Nut runners;
   13. The tools were all in working order and calibrated correctly;
   14. All tools, whether used by production staff or quality inspectors, were calibrated at least once a forthight;
   15. Each chassis must be built to customer specifications, hence the applicant must follow the unique instructions contained in the protocol book when he is performing his tasks and duties;
   16. The applicant must when using the torque tool, be guided by an on-screen green light display which shows when the bolt has been tightened to required specification. It flashed “OK” in such circumstances;
   17. The bolts are installed in batches of 4 bolts. Each bolt in the batch must be tightened to same specification;
   18. That when each group of 4 bolts has been tightened to specification, the applicant indicates obtains a sticker from the machine which is affixed in the protocol book. The applicant then signs off and stamps the protocol book;
   19. That the electronic torque tool was used to tighten to required specification. When the required torque has been attained, the on-screen display flashed “OK;”
   20. When bolts are not tightened to the required specifications, that such defect can cause a prop-shaft to become loose; it can cause engine damage; the vehicle can lose control; and that all these events can cause damage and death;
   21. During road tests, bolts worked on by the applicant had come loose;
   22. When inspected it was found that one bolt only of each batch of 4 bolts on each chassis was found to be tightened to required specifications. The other three in each group were not tightened to requires specification;
   23. The production manager and the applicant’s group leader were informed on 29 August 2017 of ………..’ findings;
   24. ……….. and the applicant had a good relationship and there was no bad blood between them;
   25. The assembly date for both chassis was the third week of July 2017;
   26. There have been cases where customers had complained of loose bolts;
   27. Certain customers had made claims under their respective warranties where bolts had come loose or fallen off;
   28. If it became known that the respondent built sub-standard products that it could cause reputational damage to its brand;
   29. The charge of gross negligence was serious;
   30. The applicant had not shown any remorse because it was his submission that he had not engaged in any wrongdoing;
   31. The applicant had valid warnings against his name. These included a written warning dated 21 June 2016 for alleged refusal to work overtime; a final written warning dated 18 November 2013 for allegedly being under the influence of alcohol; alleged poor performance counselling on 4 August and 28 October 2015;
   32. The applicant had long service.
4. I find on the probabilities on the disputed issues as follows:
   1. Whether the applicant was grossly negligent: I find that the applicant was correctly found guilty of this charge for the following reasons:
      1. The following facts were undisputed: that the applicant had worked on the 2 chassis in question; that he had attended to tightening the relevant bolts; that for each group of 4 bolts, one was correctly tightened while the other 3 were not; that an electronic torque tool was required to be used to tighten the bolts to specified torque; the OK sticker issued when the torque tool was used 4 times; and since the departure of the applicant no further incidents of loose bolts had been found;
      2. ………. on behalf of the respondent had an explanation for this state of affairs: he stated that the applicant had tightened 1 bolt correctly using the torque tool, and deliberately failed to tighten the other 3 bolts in the batch correctly. In other words the applicant had used the torque tool 3 further times on the correctly tightened bolt, thereby fooling the machine into believing that 4 bolts had been tightened correctly. The machine then issued the OK sticker;
      3. Circumstantial evidence is persuasive if the inference sought to be drawn from it is consistent with all the proved facts and it is the most plausible inference;
      4. The applicant for his part did not offer an explanation for how in each group 4 bolts, one was correctly tightened while the other 3 were not;
      5. In the absence of a competing inference, I am left only with the inference drawn by ………as a possible explanation. It must be noted further that the applicant failed to cross-examine ………on the explanation that he offered;
      6. I find the inference to be persuasive because it is consistent with all the proved facts and it is the most plausible inference.
      7. I accordingly accept the explanation of ………..
   2. Whether the charges against the applicant were fabricated: The applicant submitted during the pre-arb that he may have been targeted because he was a very active member of his trade union. It is not necessary to pursue this issue because the applicant indicated during the arbitration that he did not intend pursuing this issue.
   3. Whether the respondent had been inconsistent in the meting out of discipline: The applicant declined to name the employee or the incident concerned, and submitted that his shop steward would lead evidence in this regard.
   4. Whether the sanction of dismissal was fair: Having found that the applicant was found guilty correctly, I have to find that the sanction of dismissal to be fair having regard to the very serious consequences that may ensure in cases of gross negligence.
   5. Whether there had been a breakdown of trust serious enough to warrant dismissal: The respondent submitted that the applicant could not be trusted to perform his duties properly, diligently, without negligence, and with extra care when performing safety-critical tasks. I agree.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 7th day of FEBRUARY 2019.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R J PURSHOTAM

*Commissioner*